

No. 76-847

In the Supreme Court of the United States

OCTOBER TERM, 1976

JAMES H. TANAKA, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
*Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

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Petitioner, a former Air Force captain now serving as an enlisted man, contends that the Air Force Board for Correction of Military Records acted arbitrarily and capriciously in denying, without a hearing, his request that three unfavorable Officer Effectiveness Reports be withdrawn from his personnel file and that military decisions passing him over for promotion to major be voided.

Petitioner served on active duty as an Air Force officer from September 26, 1956, until March 30, 1971. He attained the rank of captain in the regular Air Force. From April 1964 through June 1966 petitioner was assigned as a training advisor to the Japanese Air Self Defense Force (JASDF) in the Military Assistance Advisory Group, Japan. During this period he received

three Officer Effectiveness Reports (OER's) that rated his performance somewhat lower than reports he had received in his previous duty assignments.¹

Petitioner was passed over for promotion to the grade of major by promotion boards that convened on August 27, 1969, and July 27, 1970. Having been twice considered for promotion and twice passed over, his removal from the service as an officer then became mandatory under 10 U.S.C. 8303.² To protect his accrued retirement interest, petitioner chose to resign his officer's commission effective March 30, 1971, and enlist in the Air Force as a sergeant (E-4).

Between February 1971 and May 1973 petitioner filed three successive applications with the Air Force Board for the Corrections of Military Records, requesting that the OER's for his period of service in Japan from April 1964 to June 1966 be removed from his personnel file and that his "passovers" for promotion be voided. In support he submitted two letters from rating officers suggesting that he had been rated too low,³ several "letters of appreciation," and later OER's covering his service between 1966 to 1970.⁴ The

¹On his immediately preceding tour as an instructor at the Air Force Academy Captain Tanaka had received an "Exceptionally Fine" efficiency report (Pet. App. E, p. 12a); the reports he received on this tour of duty placed him in the next lower "Very Fine" category (Government's Motion for Summary Judgment in Court of Claims, Appendices J and K).

²10 U.S.C. 8303 establishes conditions for the severance of commissioned officers who fail to achieve promotion to the ranks of captain, major, or lieutenant colonel.

³Government's Motion For Summary Judgment in Court of Claims, Appendix I.

⁴*Id.*, at Appendix B.

Board denied each application, without a hearing, finding that the facts presented failed to establish a showing of probable error or injustice in his case (*e.g.*, Pet. App. C).

Petitioner then filed this suit for reinstatement and back pay in the Court of Claims, alleging that the Board should have conducted a hearing. Petitioner also alleged that he had been a victim of racial discrimination by an unprincipled senior officer who "openly ridiculed the Japanese people and detested his assignment to Japan" (Pet. App. E, p. 12a).

After reviewing the record before the Board for Correction, the court granted the government's motion for summary judgment (Pet. App. B) and denied petitioner's motion for reconsideration *en banc* and/or a trial on the merits (Pet. Apps. A and F).

The Court of Claims correctly recognized that it has only limited authority to review military ratings and promotions, which are internal affairs of the military departments. See *Orloff v. Willoughby*, 345 U.S. 83, 93-94; *Furlong v. United States*, 153 Ct. Cl. 557, 563; *Brenner v. United States*, 202 Ct. Cl. 678, 685-686, certiorari denied, 419 U.S. 831; *Boyd v. United States*, 207 Ct. Cl. 1, 9, certiorari denied, 424 U.S. 911.

Boards for correction of military and naval records are required to conduct evidentiary hearings only when review of an applicant's available military records indicates "probable material error or injustice" that cannot be fully assessed without a hearing. *Newman v. United States*, 185 Ct. Cl. 269, 276; *Boland v. United States*, 169 Ct. Cl. 145, 151. The Court of Claims, applying the correct standard, ruled that the petitioner had "fail[ed] to tender a triable issue of fact" (Pet. App. B, p. 3a). The court noted that the two mitigating letters submitted by petitioner's former

commanding officers pointed to no misstatements of fact in the OER's but reflected only a change of opinion by those officers, and it correctly observed (Pet. App. B, p. 3a):

The reasons are obvious and need not be stated, that might cause a careful finder of fact to attach more weight to an original OER than to a subsequent attempt by its writer to modify it as to matters of opinion only. It is not for us to substitute our judgment for that of the military, in evaluating this kind of evidence.

The court's determination, specific to these facts, that petitioner's new evidence does not indicate "probable error or injustice" does not warrant review by this Court.⁵

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

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⁵As the Court of Claims recently stated in a similar case (*Boyd v. United States, supra*, 207 Ct. Cl. at 12):

The fact that plaintiff has been passed over signifies no disrespect to him. His military record appears, from all the papers before us, to have been exemplary in every respect. Numerous worthy and qualified officers are passed over annually and never reach the top in their profession. They may be qualified but—in the judgment of the Secretary and the selection board vested with discretionary authority to make the promotions—may not be the best qualified of those available for the limited number of positions. The same problem can be said to confront other ambitious professional people. There are fewer rungs as one climbs toward the top of the achievement ladder.